TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 672 92.

JOHN W. WARNER, ADMINISTRATOR OF THE ESTATE OF JOSEPH W. COLLIS, DECEASED, PLAINTIFF IN ERROR,

vs.

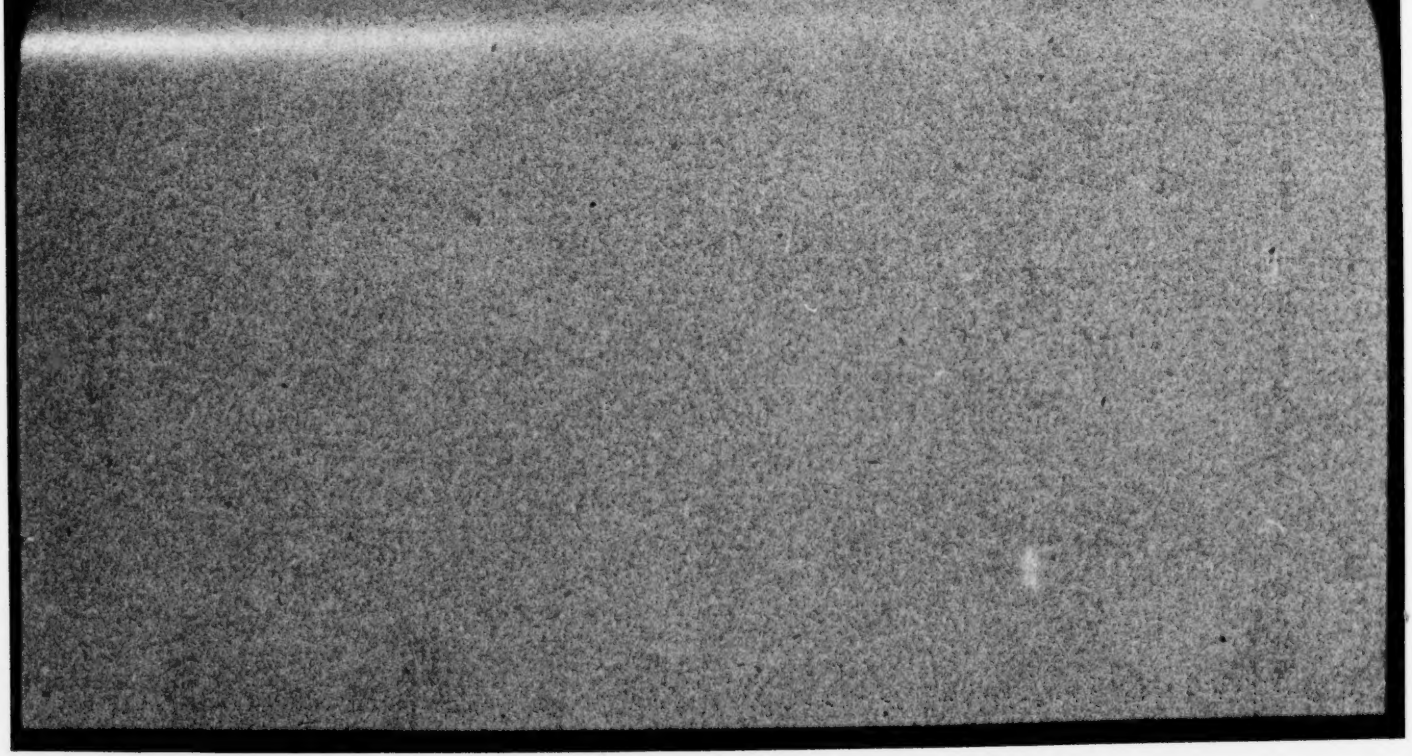
THE BALTIMORE AND OHIO RAILROAD COMPANY.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED NOVEMBER 21, 1895.

(16,092.)

160
15
800
60



(16,092.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 377.

JOHN W. WARNER, ADMINISTRATOR OF THE ESTATE OF JOSEPH W. COLLIS, DECEASED, PLAINTIFF IN ERROR,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

INDEX.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., APRIL 6, 1897.

1 In the Court of Appeals of the District of Columbia.

JOHN W. WARNER, Adm'r, &c., Appellant,
vs.
THE BALTO. & OHIO R. R. Co. } No. 452.

Supreme Court of the District of Columbia.

JOHN W. WARNER, Administrator of the Estate of Joseph W. Collis, Deceased, Plaintiff,
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY, a Corporation, Defendant. } At Law. No. 34474.

UNITED STATES OF AMERICA, *District of Columbia*, } *ss:*

Be it remembered that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

Declaration.

Filed July 13, 1893.

In the Supreme Court of the District of Columbia.

JOHN W. WARNER, Administrator of the Estate of Joseph W. Collis, Deceased, Plaintiff,
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY, a Corporation, Defendant. } At Law. No. 34474.

The plaintiff, John W. Warner, to whom letters of administration have been duly and properly issued and granted by the orphans' court of Montgomery county, State of Maryland, upon the estate of Joseph W. Collis, deceased, late of the county of Montgomery, State of Maryland aforesaid, sues the defendant, The Baltimore and Ohio Railroad Company, a corporation having an agent conducting its business in the District of Columbia, for that heretofore, to wit, on the 22nd day of June, 1893, and within one year next immediately preceding the institution of this action, by an injury done
2 and happening within the limits of the District of Columbia the death of the said Joseph W. Collis was caused by the wrongful act, neglect, and default of the said defendant, which said wrongful act, neglect, and default was such as would, if the death of the said Joseph W. Collis had not ensued, entitle him to maintain

an action and recover damages against the said defendant; and thereupon the plaintiff says that heretofore, to wit, on the 22nd day of June, 1893, aforesaid, in the District of Columbia aforesaid, the said defendant, being a common carrier of passengers for hire, was running, controlling, managing, and operating a certain railroad having divers tracks thereof running and extending through the District of Columbia aforesaid, and then and there crossing divers public streets and highways of said District of Columbia at grade or on a level with the said public streets and highways of said District, and then and there it became and was the duty of the said defendant to properly guard, operate, manage, and control its said railroad crossing, and running over and through the public streets and highways of the District of Columbia aforesaid, so that persons lawfully using said streets and highways might be on and upon and use said streets and highways with safety; and whereas the said defendant, on the day and year last aforesaid, in the District of Columbia aforesaid, in the management, conduct, control, and operation of its said railroad was possessed of a certain locomotive engine propelled by steam, which said locomotive engine was then and there under the care, government, and control of certain agents, servants, and employees of said defendant, then and there acting within the scope of their employment, who were then and there driving or running the said locomotive engine on said railroad of said defendant, within the said District of Columbia, whereupon it then and there became and was the duty of the said defendant, its servants, agents, and employees aforesaid, to run, manage, and control the said locomotive engine on its said railroad in the District of Columbia aforesaid with proper and necessary care, caution, and diligence, and to move and run said engine on said railroad and over and across the said streets and highways crossed at grade as aforesaid with great care and caution, and it then and there became and was the duty of said defendant, its servants, agents, and employees, to give all proper, timely, and necessary signals, notices, and warnings of the approach to said crossings, streets, and highways of the said engine of said defendant, so that persons lawfully upon said streets and highways could there be and use the same with safety and be warned, guarded, and protected from danger and injury in and about crossing said railroad of said defendant at its intersection of said streets and highways at grade, as aforesaid, yet the said defendant, not regarding its duty in the premises, so negligently, carelessly, and improperly failed to guard, manage, and operate its said railroad, and so negligently, carelessly, and improperly ran, guided, managed, and controlled its said locomotive engine, and so negligently, carelessly, and improperly failed to give proper, timely, and necessary signals, notices, and warnings of the approach to said crossings on said streets and high-
3 ways of said engine of said defendant that by reason of the carelessness, negligence, and improper conduct of the defendant in the premises the said Joseph W. Collis, on the 22nd day of June, 1893, in the District of Columbia aforesaid, while lawfully on and upon the said streets and highways of the District of Columbia,

crossed at grade as aforesaid by the tracks of the said defendant, was, without any fault, negligence, or misconduct whatsoever on the part of the said Joseph W. Collis, struck and injured by defendant's locomotive engine aforesaid, then and there negligently, carelessly, and improperly run, managed, and controlled by the said defendant, its servants, agents, and employees, and by reason of the wrongful act, neglect, and default of the said defendant, its agents, servants, and employees aforesaid, the death of the said Joseph W. Collis was caused and did ensue from the injury then and there done and happening in the District of Columbia as aforesaid.

And the said Joseph W. Collis, whose death was caused as aforesaid, left him surviving his widow, Lucy E. Collis, and three children, to wit, two daughters and one son; and by reason of the premises and the statute in such cases made and provided an action for damages hath accrued to the said plaintiff, to wit, in the sum of ten thousand dollars ($10,000), and therefore the plaintiff sues.

2nd. The plaintiff, John W. Warner, to whom letters of administration have been duly and properly issued and granted by the orphans' court of Montgomery county, State of Maryland, upon the estate of Joseph W. Collis, deceased, late of the county of Montgomery, State of Maryland aforesaid, sues the defendant, The Baltimore and Ohio Railroad Company, a corporation having an agent conducting its business in the District of Columbia, for that heretofore, to wit, on the 22nd day of June, 1893, and within one year next immediately preceding the institution of this action, by an injury done and happening within the limits of the District of Columbia, the death of the said Joseph W. Collis was caused by the wrongful act, neglect, and default of the said defendant, which said wrongful act, neglect, and default was such as would, if the death of the said Joseph W. Collis had not ensued, entitle him to maintain an action and recover damages against the said defendant; and thereupon the plaintiff says that heretofore, to wit, on the 22nd day of June, 1893, aforesaid, in the District of Columbia aforesaid, the said defendant, being a common carrier of passengers for hire, was running, controlling, managing, and operating a certain railroad having divers tracks thereof running and extending through the District of Columbia aforesaid and then and there crossing divers public streets and highways of said District of Columbia at grade or on a level with the said public streets and highways of said District, and then and there it became and was the duty of the said defendant to properly guard, operate, manage, and control its said railroad crossing and running over and through the public streets and highways of the District of Columbia aforesaid, so that persons lawfully using said streets and highways might be on and upon and use said streets and highways with safety; and whereas the said defendant, on the day and year

4 last aforesaid, in the District of Columbia aforesaid, in the management, conduct, control, and operation of its said railroad, was possessed of a certain locomotive engine propelled by steam, which said locomotive engine was then and there under the care, government, and control of certain agents, servants, and em-

ployees of said defendant then and there acting within the scope of their employment, who were then and there driving or running the said locomotive engine on said railroad of said defendant within the said District of Columbia, whereupon it then and there became and was the duty of the said defendant, its servants, agents, and employees aforesaid, to run, manage, and control the said locomotive engine on its said railroad, in the District of Columbia aforesaid, with proper and necessary care, caution, and diligence, and to move and run said engine on said railroad and over and across the said streets and highways crossed at grade as aforesaid with great care and caution, and it then and there became and was the duty of said defendant, its servants, agents, and employees, to give all proper, timely, and necessary signals, notices, and warnings of the approach to said crossings, streets, and highways of the said engine of said defendant, so that persons lawfully upon said streets and highways could there be and use the same with safety and be warned, guarded, and protected from danger and injury in and about crossing said railroad of said defendant at its intersection of said streets and highways at grade as aforesaid, yet the said defendant, not regarding its duty in the premises, so negligently, carelessly, and improperly failed to guard, manage, and operate its said railroad, and so negligently, carelessly, and improperly ran, guided, managed, and controlled its said locomotive engine, and so negligently, carelessly, and improperly failed to give proper, timely, and necessary signals, notices, and warnings of the approach to said crossings on said streets and highways of said engine of said defendant that by reason of the carelessness, negligence, and improper conduct of the defendant in the premises the said Joseph W. Collis on the 22nd day of June, 1893, in the District of Columbia aforesaid, then and there being a passenger of said defendant and then and there being possessed of and having a certain ticket sold by said defendant to said Joseph W. Collis, by virtue of which said ticket the said Joseph W. Collis was then and there entitled to be carried by said defendant to the place of destination named and indicated on said ticket, the said Joseph W. Collis on the day and the year last aforesaid, while lawfully upon the said streets and highways crossed by said railroad at grade, in the District of Columbia aforesaid, at or near a certain place, depot, or station called and known as "University," said depot or station being then and there kept, maintained, and controlled by said defendant for the conduct of its business and the accommodation of its passengers, and being the depot or station where the said Joseph W. Collis properly was and whence he should leave, by virtue of the conditions and terms of his ticket aforesaid, the said Joseph W. Collis, then and there, while attempting with all proper care, caution, and diligence to cross one of the defendant's said railroads, which it then and there was necessary and proper for the said Joseph W. Collis to cross in order to take passage on a certain other train of cars by said defendant owned, managed, and controlled, which said train of cars was then and there at said depot or station standing and waiting and being for

the reception of the said Joseph W. Collis and passengers going to the place of destination on said ticket indicated, was, without any fault, negligence, or misconduct whatsoever on the part of the said Joseph W. Collis, struck and injured by defendant's locomotive engine aforesaid, then and there negligently, carelessly, and improperly run, managed, and controlled by the said defendant, its servants, agents, and employees; and by reason of the wrongful act, neglect, and default of the said defendant, its agents, servants, and employees aforesaid, the death of the said Joseph W. Collis was caused and did ensue from the injury then and there done and happening in the District of Columbia as aforesaid.

And the said Joseph W. Collis, whose death was caused as aforesaid, left him surviving his widow, Lucy E. Collis, and three children, to wit, two daughters and one son; and by reason of the premises and the statute in such cases made and provided an action for damages hath accrued to the said plaintiff, to wit, in the sum of ten thousand dollars ($10,000), and therefore the plaintiff sues.

RODOLPHE CLAUGHTON,
Attorney for Plaintiff.

Notice to Plead.

The defendant, The Baltimore and Ohio Railroad Company, is to plead hereto on or before the first day of the first special term of the court occurring twenty days after service hereof; otherwise judgment.

RODOLPHE CLAUGHTON,
Attorney for Plaintiff.

Defendant's Plea.

Filed August 31, 1893.

In the Supreme Court of the District of Columbia.

JOHN W. WARNER, Administrator of the Estate of Joseph W. Collis, Deceased, vs. THE BALTIMORE AND OHIO RAILROAD CO. } At Law. No. 34474.

For plea to the declaration filed in the above-entitled cause the defendant says that it is not guilty as alleged.

HAMILTON & COLBERT,
Attorneys for Defendant.

6 SATURDAY, *March 9th*, 1895.

Session resumed pursuant to adjournment, Mr. Justice Bradley presiding.

* * * * * * *

JOHN W. WARNER, Administrator of the Estate of Joseph W. Collis, Deceased, Plaintiff,
v.
THE BALTIMORE AND OHIO RAILROAD COMPANY, Defendant.
} At Law. No. 34474.

This case coming on to be heard upon the plaintiff's motion for a new trial, and the same having been heard, is overruled. Therefore it is considered that the plaintiff take nothing by his suit, and that the defendant go thereof without day and recover against the plaintiff its costs of defense, to be taxed by the clerk, and have execution thereof.

Entry of Appeal & Order for Citation.

Filed March 11, 1895.

In the Supreme Court of the District of Columbia.

JOHN W. WARNER, Adm'r, Pl'ff,
vs.
THE BALTIMORE & OHIO RAILROAD COMPANY, Def'd't.
} At Law. No. 34474.

The clerk of said court will please enter an appeal to the Court of Appeals of the District of Columbia by above-named plaintiff from the judgment of said supreme court, entered in above-entitled cause on the 9th day of March, 1895, and cause citation to be issued to defendant (appellee) herein.

RODOLPHE CLAUGHTON,
Att'y for Appellant.

In the Supreme Court of the District of Columbia.

JOHN W. WARNER, Administrator of the Estate of Joseph W. Collis, Deceased,
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY.
} At Law. No. 34474.

The President of the United States to the Baltimore and Ohio Railroad Company, Greeting:

You are hereby cited and admonished to be and appear at a Court of Appeals of the District of Columbia, upon the docketing the cause therein under and as directed by the rules of said court, pursuant to an appeal filed in the supreme court of the District of
7 Columbia on the 11 day of March, 1895, wherein John W. Warner, administrator of the estate of Joseph W. Collis, deceased, is appellant and you are appellee, to show cause, if any there be, why the judgment decree rendered against the said appellant should not be corrected and why speedy justice should not be done to the parties in that behalf.

Seal Supreme Court of the District of Columbia.

Witness the Honorable Edward F. Bingham, chief justice of the supreme court of the District of Columbia, this 11 day of March, in the year of our Lord one thousand eight hundred and ninety-five.

JOHN R. YOUNG, *Clerk.*

Service of the above citation accepted this 11 day of March, 1895.

HAMILTON & COLBERT,
Attorneys for Appellee.

(Endorsed:) No. 34474. Law. John W. Warner, adm'r, *vs.* Baltimore and Ohio Railroad Co. Citation. Issued M'ch 11, 1895. Served cop- of the within citation on —— ——. —— ——, marshal. R. Claughton, attorney for appellant.

1895, M'ch 25.—Bond for appeal filed.

Bill of Exception.

Filed April 1, 1895.

In the Supreme Court of the District of Columbia.

JOHN W. WARNER, Administrator of Joseph W. Collis, Deceased, Plaintiff,
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY, Defendant.
} At Law. No. 34474.

Be it remembered that this cause came on for trial before the Honorable Andrew C. Bradley, the presiding justice, and a jury on the 8th day of February, 1895.

Whereupon the plaintiff, to maintain the issues on his part joined, proved that at the time of the accident mentioned in the declaration the defendant was a common carrier of passengers for hire, was a corporation, and that John W. Warner was the duly appointed administrator of Joseph W. Collis, deceased.

Thereupon the plaintiff called as a witness CHARLES C. HOLLIDGE, who, being duly sworn, testified that he lived at Brookland, and had lived there for six years; that on June 22nd, 1893, he was not employed, but was living at Brookland; that the tracks of the defendant divided Brookland from University station; about 9 o'clock on the morning of June 22, 1893, he was standing in a field
8 about two squares from his house; that he was just through cleaning off a horse; at the moment he was not doing anything; that he heard the express train whistle and had finished cleaning the horse two or three minutes before that; that he was in the habit of observing trains which passed University station; that he was about three squares and a half from the whistle post; that his hearing and vision were good; that the first intimation he had

of the express train was the whistle, which was a long, screeching, very shrill whistle; that the whistle generally blew three times, but he did not hear the three-time whistle that morning; that he did not hear the express train ring any bell: that it was going about 40 or 45 miles an hour; that he went to the station about two minutes after the train passed and there saw Mr. Collis, who died a few minutes after he was struck.

On cross-examination the witness testified that he was in the habit of gauging time by the passage of trains; that at the time the express train passed he was about two squares from the station; that the express train began to whistle about 150 feet from the station; that it had been whistling about a half minute; that it started to whistle when it was about 150 feet from the station; he could not say positively that it was whistling a half minute before it reached the station, that he did not see the accident.

On redirect examination the witness stated that when he heard the whistle he looked up; that when he looked up the last car was about 50 feet from the station and he just saw it pass by; the time was a little after 9 o'clock in the morning.

Thereupon the plaintiff called as a witness JAMES E. WEEKS, who testified that on the morning of the accident he was on one of the defendant's trains at University station, going north, and sitting on the west side of the car; that his hearing and vision were good; that when his train came to a stop he saw two gentlemen at the south end of the depot building; one of them started to walk up the platform and the other went down; one of them approached the train in which he was sitting; when he started to approach the train the local train was at a stand-still, and the person he observed was then about 12 feet away from him; at that time his attention was attracted by the danger signal of an approaching train, which was a shrill, sharp blast, blowing in quick succession; as soon as he heard the blast witness raised his eyes and the train was then about 40 or 50 feet off; it did not stop at University, and did not stop at all so far as witness could see; at that point there is a gradual curve; the next thing that witness noticed was that the train struck this man; that the whistle post is about four or five hundred yards north of University station; that the car in which witness was seated was standing at the station; that there was no whistle blown by the express train, except the danger whistle, and no bell was rung; the first intimation he had of the approach of the express train was the danger signal; the express train was going from 40 to 45 miles an hour; there is a plank walk leading from
9 the station to the other side; that walk starts about the center of the depot and goes straight across to the other platform; the person he saw started on the plank walk and then cut across a little diagonally from his course so as to get on the car which witness supposed he was going to take; he was just off the end of the plank when he was struck; he walked on that board walk until he was deflected by the line of this car; he was either going to get on the forward car or the middle car, one or the other; if he had gone

straight across it would have brought him to the car about four feet from the platform.

On cross-examination the witness stated that he was in the middle coach of the train and saw this gentleman whom he was afterwards told was Mr. Collis on the platform; that he did not see the express train until he heard it whistle; that so far as he knew there was nothing to obstruct Mr. Collis' view up the track. He was seated almost opposite Collis. The witness supposed that Collis would have had a clear view up the track if he had looked; that there was no obstruction between Collis and the express train so far as witness knew. Collis seemed about to get on the train on which witness was seated on the side nearest to him; that he had approached the car and would have gotten on from the side nearest to the other track. He walked on the plank walk part of the way, and then turned diagonally towards the platform of the car. When the express train blew he was nearly across the tracks. When the express train blew it was 40 or 50 feet from him. The distance between the rails of each track is about five feet. Standing on the platform at University station and looking north, a person can see between a quarter and a half mile.

Thereupon WILLIAM H. WHITE was called as a witness by the plaintiff, and testified that on the day of the accident he was employed as gate watchman at University station and went on duty at six o'clock in the morning; that he first saw Mr. Collis at 7.20 in the morning when he got off the train at University station; that that train was scheduled to stop at Forest Glen on its way to Washington. After Collis arrived he went to West Brookland, which is west of the tracks.

On cross-examination he stated that he again saw Mr. Collis at University station about 8.30, but that he did not see him struck. He last saw him under the arch of the station. He was then standing talking to several persons. Witness did not see the accident at all.

On redirect examination the witness stated that at the time the express train which struck Collis passed an accommodation train was at University station; it was about stopping.

The plaintiff then called as a witness SAMUEL B. HEGE, who stated that he was employed by the Baltimore and Ohio Railroad Company as district passenger agent, and had been living at Rockville six or seven years. He had been employed by them for a number of years; that his business as well as his residence at Rockville rendered him familiar with the movement of trains in a measure between Rockville and Washington; that he had been in his present business four years, and had lived at Rockville for six years; that he came over the road every day; that he knew University station; that there was a double-track system there, operated by the Baltimore and Ohio railroad. On June 22nd, 1893, the witness White was ticket agent at said station, and the company was selling round-trip or 30-day tickets from Forest Glen

to University; the return coupon would ordinarily be held by the passenger until he got on the train to take the journey back.

Thereupon counsel for the plaintiff tendered the witness a ticket, which he identified as a ticket issued by the Baltimore and Ohio.

It read as follows: "Baltimore & Ohio railroad. Round-trip ticket. Good only for one continuous passage University to Forest Glen, Maryland. In consideration of the reduced rate at which this ticket is sold it is distinctly understood and agreed by the purchaser that it will be absolutely forfeited if not used within thirty days, including day of sale, as stamped on the back." The date stamped on the back was June 21, 1893. The ticket was in force on the 22nd of June. University station was the proper place for a person to start from with that ticket. The witness further testified that the ticket agents at the various ticket offices are always promptly informed of any changes in the movement of trains. On the 22nd of June, 1893, there was an express train which left Hagerstown, passing Rockville and going to Washington, which left Rockville about 48 minutes after 8. It reached Washington about 9.15 or 9.20. Rockville is about 16 miles and a fraction from Washington. The shortest time made by any express train between Rockville and Washington is about 28 minutes. On June 22nd, 1893, the first train leaving Washington and going up the Metropolitan branch left about 9.30 in the morning. Witness is not clear on the point whether there was a train at 9 in the morning. Local trains leaving Washington always stopped at University station. It took trains about from 9 to 11 minutes to run from Washington to University station. They stopped there for the purpose of taking on and discharging passengers. The express trains coming towards Washington used the west track and the local trains going out from Washington used the east track. The station at University is west of both tracks, and passengers would have to cross the tracks to take the north-bound train.

Thereupon the plaintiff called as a witness WILLIAM SHUNBERGER, who, being duly sworn, testified that on the day of the accident to Mr. Collis he was manager of the morgue in the District of Columbia; that Mr. Collis' body was brought to the morgue between 10 and 11 o'clock. The witness thereupon identified the pocket-book found on the person of the deceased, which contained the return portion of the round-trip ticket identified by the witness Hege.

11 Thereupon plaintiff recalled WILLIAM H. WHITE, who testified that he was employed by the Baltimore and Ohio Railroad Company on June 22, 1893; that while so employed he received a book of the rules of the company, and he identified the book, which was thereupon offered in evidence, and which contained the following rule: "No. 441. When one passenger train is standing at a station receiving or discharging passengers on double track no other train, either passenger or freight, will attempt to run past until the passenger train at the station has moved on or signal is given by the conductor of the standing train for them to come

ahead, and the whistle must not be sounded while passing a passenger train on double track or sidings unless it is absolutely necessary."

Thereupon plaintiff called as a witness JAMES E. KELLY, who testified that he came to Washington on the morning of the accident in response to a telegram from one of the Baltimore and Ohio railroad officials; that he came to Washington and went to the morgue, and there received from the keeper of the morgue the purse containing the ticket heretofore offered in evidence.

Thereupon the plaintiff called as a witness WILLIAM A. COLLIS, who testified that he was a son of the deceased; that his father had three children—two married daughters and the witness, who was 19 years old; that the deceased was a little more than 46 years old at the time he was killed; that the witness — not living home. He was living with his brother-in-law.

Thereupon plaintiff called as a witness Mrs. JAMES E. KELLY, who testified that she was a daughter of the deceased. He was a carpenter, and was 55 years old at the time of his death; that in June, 1893, Mr. Collis and his wife were living in the same house with the witness; that the wife of the decedent was 46 years old, the witness was 24 years old, her sister 19, and the boy 15 at the time of the accident; that her father's health was always good, and he always provided for his family.

Thereupon plaintiff called as a witness LAWRENCE W. BURKE, who testified that he was a carpenter and builder; that he saw the deceased on the 22nd of June, 1893, at West Brookland, D. C., and witness told Collis that he would give him employment on the following Monday. Witness further testified that the earning capacity of the average carpenter was about $750.00 a year.

And thereupon the plaintiff recalled CHARLES C. HOLLIDGE, who testified that at the time of the accident he was attracted by the danger signal of the express train, and looked up, and at the moment he looked up he saw the rear car passing, and the rear car was between 150 and 200 feet from University station.

On cross-examination the witness testified that he did not
12 know where the engine was when he looked up; that he only saw the last car on the train; that he did not know whether the engine had reached Brookland station; he only saw the rear car of the train, because there was a house between him and the station which cut off the view of the rest of the train.

Thereupon the plaintiff rested his case; and the defendant, to maintain the issues on its part joined, offered as a witness C. W. EGAN, who identified several photographs made by him in the scene which accurately represented the situation of things at University station on the 22nd of June, 1893, and which photographs were

offered in evidence. The witness further identified a map prepared by him from actual survey, which map was drawn to a scale, and which map was offered in evidence. Standing on the edge of the platform at University station, the view was unobstructed for one mile and four-tenths. There was a train indicated on the photograph, which was at Terra Cotta station, nearly a mile away. There was a platform connecting the east and west platforms. The distance between the rails of each track was 4 feet 8½ inches, and the distance between the two tracks was 7 feet 5 inches. The whistling post was 16 hundred feet north of University station.

On cross-examination the witness testified that there was a whistling post 1,600 feet north of University station, where trains whistle for the station. After passing that point and within 600 feet from the station it blows for the crossing two short and two long blasts. That is an alarm whistle for crossings. The crossing is south of University station and is the Bunker Hill road crossing. The brick yards are not an obstruction to the view looking north from University station, because they are not on the right-of-way limits. The witness further testified that the right of way of the company at that point was 140 feet, 70 feet on each side of the center line, and within that stretch of 140 feet there was no obstruction to interfere with the view of the tracks.

Thereupon the defendant called as a witness JOHN H. STEPHENS, who testified that he had been an engineer on passenger trains since 1872; that he was the engineer of the express train which struck and killed Mr. Collis; the train left Hagerstown at 6.30 in the morning and was due in Washington at 9.20; that he reached University station on time, but was 7 or 8 minutes late getting into Washington by reason of this accident; that as he passed University station he was running about 40 miles an hour, which was about schedule speed; that on this morning when he reached the whistling post he blew a long blast; that after he got by the whistling post he saw Mr. Collis standing on the platform, but did not think that Collis would go over. The witness further stated that just before he got to him, when the engine was 60 or 70 feet from him, Collis started across, and the very instant that he started across witness blew the danger signal, 4 or 5 short blasts, and Collis still kept on. While witness was blowing the whistle with his right hand he put the air brakes on with his left, but the left side
13 of the engine struck the man. Witness testified that he did all that lay in his power to stop, but could not stop until he had gone about 350 or 400 yards beyond the station; he then stopped and backed his engine back. When he was going down towards University station on that morning when he blew the station whistle he did not see the local train, but it was coming up. When the express passed University station witness was not certain whether the local train had stopped or not, but if it had not stopped it was very nearly so. He did not see the local train until he blew the whistle for the station. Witness further testified that he first saw Mr. Collis when he was standing on the platform; then he

started to go across, and when witness saw that he could not get across he commenced blowing the danger signal and the fireman commenced ringing the bell. He did not go straight across, but was walking obliquely—sort of sideways—with more of his back to me than his face. One more step would have put him over.

On cross-examination witness testified that coming down towards University station he saw the local train. He don't know whether it was moving or had stopped entirely. He knew its various places of stopping; that he did not know whether the local train was going to stop or not, for the reason that when they did not have any passengers they did not stop—that is, if there is no one to get on or off; that he saw one man get off the train, but saw nobody else at the station waiting to get on besides Mr. Collis; that he knew the train coming up was an accommodation train; that people did not get on from the west side of the local train, but they got on on the east side. On the express train on that occasion there were two coaches, a combination car, engine, and tender. The coaches and car were each about 60 or 65 feet long; the tender was about 20 or 25 feet long; the engine proper was about 15 or 20 feet long. The floor of the cab on the engine is 4½ or 5 feet from the ground; the cab is 8 or 9 feet wide. Witness further states that he did not see Mr. Collis struck, as he passed out of view in crossing over the tracks. Witness further testified that the only whistle blown by him was a long blast at the whistling post and the danger signal, which was blown when he was 60 or 70 feet away. Witness further stated that he knew there was such a rule in the book as rule No. 441, but it was impossible to carry out the rule and make schedule time, and that the rule never was carried out. The rule was in the book, but it was never carried out. When witness whistled at the whistling post he did not see the local train coming, because it was around the curve. Witness further testified that the express train was due at University station at 9.11 and the local train was due at 9.09.

Thereupon the defendant called as a witness JAMES PERRY, who testified that he was the engineer of the local train on the occasion of the accident to Mr. Collis; that he usually passed the express train at University station or a little beyond; that he was on time on that morning; that he was in the act of stopping when the express train passed. He had not stopped, but was just easing
14 along slow to give the express a chance to get by, because people get off on the track. He did not see Mr. Collis at all. The local train had not stopped, because witness had often noticed that a good many people would jump on the wrong track, and he was just easing along slowly to keep people from getting in the way. He heard the express train blow the danger signal when he was 50 or 70 feet from the station. He had not heard any whistle before that.

Thereupon the defendant called as a witness SAMUEL REYNOLDS, who testified that he was the fireman of the express train which

struck Mr. Collis; that the engineer blew the whistle at the whistling post; that he heard nothing more until he heard the danger signal blow. Witness was shoveling coal in at the time, and when he heard the whistle blow he dropped the shovel and grabbed the bell; the next he saw was a man running across and hit; the engine was then about 60 or 70 feet from him; the engineer did all he could to stop; he shut his valve off and put on the air. Mr. Collis had his left side towards the express train; the front bumper on the left side of the engine struck him and he was thrown between the tracks. North of University station there is nothing to prevent a person from seeing a mile up the track that morning. From Rockville to Washington the grade is down. The express train was running about 40 miles an hour.

Thereupon the *plaintiff* called as a witness A. TURNER, who testified that he was a conductor on the express train that struck Mr. Collis; he was in the rear car; that he heard the engine blow when it was about at the whistle post, about 1,500 feet from the station. Soon after, when the train was about 60 feet from the station, he heard a succession of blasts, which was the danger signal, and at the same time felt the air applied. The train ran between 350 and 400 yards below the station before it stopped.

Thereupon the defendant called as a witness BRADFORD WORTHINGTON, who testified that he was the baggagemaster on the train that struck Mr. Collis; that he heard the engineer blow for University station, but how far north of the station he did not know; shortly after that he heard the danger signal blown and he felt the air put on.

On cross-examination the witness testified that he did not know where the engine was when the engineer blew for the station, but thinks that in the interval of time between the first signal and the danger signal the train might have run 1,200 feet or a little further; as near as he could tell, it had run about 1,200 or 1,500 feet.

CHARLES R. LEE was thereupon called by the defendant as a witness and testified that he was the fireman on the local train going north on the morning that Mr. Collis was killed; he was on the left-hand side of the engine and saw Mr. Collis struck; his train was due at University at 9.09; the witness could not say whether he was on time or not; the train might have been a few minutes late; when the express train was coming around the curve witness saw the engineer blow for the crossing, and then after he left Terra Cotta he heard him blow for the station; witness was standing in the cab talking to the engineer when he heard the danger signal and saw a man knocked against the side of the local train; the local train was just slowing up and had not come to a stand-still; the witness was positive that he heard the whistle blow.

On cross-examination witness testified that he heard three whistles blow, two long blasts and two short ones, for the crossing, one

for the station and 4 or 5 blasts in rapid succession for the danger signal.

Thereupon the defendant called as a witness MORRIS HAMPTON, who testified that he was a machinist employed by defendant; that he was on the local train on the morning of the accident to Mr. Collis, on the left-hand side, sitting about midway the coach. He saw Mr. Collis standing on the platform and heard the express train when it blew for the station. He watched Mr. Collis to see if he was going to come across. He stepped down off the platform and crossed over the track. Witness then heard the express train blow the danger signal and put his head out of the window and watched the decedent. He crossed over and got on the outside rail and turned his back towards the express and started up the track and the express train hit him. When witness put his head out of the window the express train was only 30 or 40 feet away from Mr. Collis. Collis did not go straight across. He went across until he got on the outside rail near the middle of the track and turned his back towards the engine. He did not make more than two steps when the engine struck him. The witness was sure that he heard the express train blow for the station.

Thereupon the defendant called as a witness CHARLES A. THOMPSON, who testified that he was a passenger on the local train on the morning of the accident, sitting on the left-hand side. He saw the accident. He heard the express train blow for the station, and shortly after that heard the danger signal blow. He threw his head out of the window and looked at the crossing, turned back and saw a man put his foot off the platform and onto the track. Witness watched him, and he walked across to get on the end of the ties on the other side of the west track, turned around and came towards where witness was sitting on the ties, when the express train struck him in the back and threw him against the place at which witness was sitting; witness thought his body would come in through the window; the express train was not more than 40 feet away from Mr. Collis when he put his foot on the west rail of the west track; it was not possible to stop the train; when Collis put his foot on the west rail of the west track the local train had not come to a stop; the local train was moving slowly; the local train ran about half a car-length after Collis was struck.

On cross-examination witness testified that as soon as the
16 danger signal was blown he put his head out of the window; he was seated in the last coach of the local train; that he was going to Garrett Park, which was several stations beyond University; he was putting in some machinery at Garrett Park. Witness heard the engineer blow the station whistle and then the danger signal; he heard two short and two long blasts, and after that the danger signal, which was a succession of short blasts; the train ran about 12 or 15 hundred feet after blowing the station whistle before the danger signal was blown; witness did not know

whether the station whistle was blown 600 feet north of the station or 1,500 feet north.

Thereupon the defendant called as a witness ISAAC R. HINE, who testified that he was coming down on the express train on the morning of the accident, seated on the left-hand side, and saw the local train when he passed; that he was a passenger and was seated in the smoking car; that he heard the whistle blow for University station; then he heard the danger signal.

On cross-examination witness testified that he did not see Mr. Collis struck. As soon as the danger signal blew he jumped up and ran to the window, but could not see anything. The first signal blown was a long blast for the station. The whistle post was located between 1,500 and 1,600 feet north of the station. The train was near the whistle post on this morning when the engine blew for the station; that he was by occupation a bridge-inspector on the Baltimore and Ohio railroad.

On redirect examination the witness testified that after his train passed University station it stopped and came back.

Thereupon the defendant called as a witness CHARLES W. HUGHES, who testified that he was a mail clerk employed by the United States and was on the express train that struck the deceased; he was on his way home, going to Baltimore by way of Washington; that he had no interest in the pending suit; that on the morning of the accident he was sitting in the last seat in the last coach, with the window up, and as the express train passed Terra Cotta station he looked out of the window and had his head out all the way down until he passed University station. When the engineer was at the whistle post he blew one long blast and a few seconds later he blew the danger signal. Witness saw the man on the platform, saw him get down on the track, but thought he had gotten over. Immediately after the danger signal was blown the witness felt the air applied, and the train stopped as soon as it could and came back. Witness got off the train and saw that the man was dead. When Mr. Collis stepped off the platform on the track the engine was about 60 or 70 feet from him. It was not possible to stop the train in time to avoid hitting him. The train was running about 40 miles an hour, which was the usual rate of speed for that train. Mr. Collis went over the track obliquely, with his left side towards the train. Witness did not see the local train until he passed it. He did not know whether it was moving or not.

On cross-examination the witness testified that he was on
17 the left-hand side; that he heard the engineer blow at the whistle post because he was looking out the window and saw when the engineer passed it; the interval between the first signal and the danger signal was only a few seconds; he noticed only two signals; the whistle post is on the left-hand side of the track coming towards Washington, on the same side that the witness was seated; he was on the same side with the station, which was on the right

side of the train instead of the left, as the witness had previously stated.

Thereupon the defendant called as a witness THOMAS B. QUEEN, who testified that he was a merchant and was on the express train the morning of the accident; that he heard the whistle blow for University station; it was blown somewhere near Terra Cotta station; the first whistle was a long blast and then the danger signal; only a very short time intervened between the first whistle and the danger signal; the train travelled some hundred feet in that time; the witness was sure about the blowing of the two whistles.

On cross-examination the witness testified that Terra Cotta was the next station north of University; he thought Terra Cotta was nearer the university than the whistle post was.

Thereupon the defendant called as a witness JAMES A. LEWIS, who testified that he was a student attending school, but on the day of the accident was a news agent travelling on the Baltimore and Ohio between Baltimore and Hagerstown; that he was on the express train on June 22, 1893, in the rear seat of the smoking car, on the left-hand side coming down; that he saw nothing of the accident except the body of the man rolling as the express passed the other train; coming down he heard the express train first blow a long blast, longer than is usually blown at other stations, because the express did not stop at that station; a very short time intervened between the first blast and the danger signal, which was a succession of 4 or 5 blasts; the witness said he could not be mistaken about these two whistles.

On cross-examination the witness testified that he had been travelling on that train for a year and six months every day except Sundays; that he missed only three days in a year and a half; that he could not positively state where the train was when it blew the first whistle, but that a short time intervened between the first whistle and the second; that he did not hear any whistles but those two.

Thereupon the defendant called as a witness WILLIAM H. WHITE, who testified that on the morning of the accident he was the gateman at the crossing just below University station; that the express train blew the first time at the brick yard, which was 4 or 5 or 6 hundred yards north of the station; that the brick yard was between the whistle post and the station; that it is only about 300 yards from the station to the brick yard; that signal was the long blast. The next that witness heard was when the train was
18 ten or twelve feet above the station it blew the danger signal, two or three blasts.

On cross examination the witness stated that when the train was at the brick yard he heard the first whistle. The brick yard is some distance below the whistle post; that the brick yard is 700 or 800 feet nearer the station than the whistle post.

Thereupon the defendant called as a witness COLUMBUS M. LLOYD, who testified that on the morning of the accident to Mr. Collis he was a brakeman on the local train going west; that he was on the left-hand side of the train, in the rear car; that the window was up; that he heard the express train blowing the danger signal; that he looked out of the window and saw a gentleman step down on the track and start across towards the west-bound track. If he had gone back witness thinks he would have been saved, but he did not go back; he kept on. At that time the engine was about 10 or 15 feet west of the platform. The platform extends about 30 feet west of about where he started to cross the track, so that he was 40 or 45 feet from the train when he started on the track; that he did not hear any whistles blow besides the danger signal. In fact he had not been noticing whistles. When witness heard the danger signal the rear car of the train he was on was going over the crossing. The local train was still moving when the danger signal blew. He saw Mr. Collis struck. He was not going straight across the track, but was going more with his face towards the road crossing, with his side and back towards the west-bound track. He was not walking on the plank walk that connected the two platforms, but was 8 or 10 feet east of that crossing.

On cross-examination the witness testified that when he first saw Mr. Collis he was stepping down on the track off the platform; that he never noticed him until the express train blew the danger signal. Then witness looked out and saw him. He was just stepping down, and the next step the train hit him. He had stepped down on the track and was making his step over the second rail. He had gone over one rail and was making his step over the second rail when the train hit him on the left side. His head went back and struck the bumper of the engine. He appeared to be coming towards the local train. The local train had not stopped when he started to cross. The first that witness saw of him was that he was off the board platform.

Thereupon the defendant called as a witness Mrs. ADDIE C. WHITE, who, being duly sworn, testified that she resided in Brookland and witnessed the death of Mr. Collis; that she was standing on her porch about 50 or 100 feet from the station; that she saw Mr. Collis come over and run in front of the express train; that she heard the express train blow a long blast. It was at the brick yard when it gave the long blast. After that she next heard four distress whistles, which were short, sharp blasts. Mr. Collis was sitting behind the arch, and when he heard the train coming up he
19 started from under the arch and started around to cross the track and get on his train. The local train was then moving, and the express train was about 50 feet away. He started straight across, and when he got nearly to the outside rail the train struck him. He did not stop at all and did not look in either direction. His side was towards the express train. He was running, and at the time the local train was still moving up towards the station.

On cross-examination the witness testified that she could not tell whether Mr. Collis heard the express train blow or not, but witness heard it blow and she did not see why he could not hear it, for there was no other noise except the trains; that the express train first blew at the brick yard, and at that time the local train was almost ready to stop. A short time intervened between that whistle and the danger signal, because it is not very far from the brick yard to University station. That she was standing on her porch, about 50 or 100 feet from the station, right across the road. There was nothing in the way of obstruction that prevented her from having a full view of Mr. Collis. Witness further stated that she was in her hall sewing, and she went to the window and looked out, as she always did when she saw trains coming to see who got off and on; she knew the express train did not stop, but knew that the accommodation was coming up; that she saw a lady and a child get on the local train; that she saw Mr. Collis when the engine hit him; that she heard the local train blow a long blast for the station; then she got up and went out on the porch; when she heard the local train coming she got up and went out; when she was looking at the local train she heard the express train blow at the brick yard; then in a short time she heard the danger signal, but no other signal. The witness could distinguish the different sounds produced by the whistles on the local train and the express train. Witness further stated that she heard the local train whistle down below the station and the express train whistle up in the other direction, and that she could hear them both. Her residence was on the right-hand side of the tracks coming to Washington; that she was facing the station, west of the western track.

Thereupon the defendant recalled C. W. EGAN, who testified that the brick yards are between fifteen and sixteen hundred feet north of University station.

On cross-examination the witness stated that the brick yards are opposite the whistle post. The witness further testified that he heard several of the witnesses state that the brick yard was not so far up as the whistle post, but he stated that other witnesses did not measure it, but he did, and made the survey.

And thereupon counsel on both sides announced their testimony closed.

And thereupon the defendant, by its attorneys, moved the court, on all the evidence, to direct a verdict in favor of the defendant; which motion was granted by the court and a verdict, by
20 order of the court, was returned by the jury in favor of the defendant; to the granting of which said motion by the court, directing the jury to return a verdict in favor of the defendant, the plaintiff duly excepted and the exception was noted on the minutes of the court; and the plaintiff, by his attorney, requests the justice presiding to sign, seal, and enroll and make a part of the record

the plaintiff's bill of exception, and it is accordingly done, now for then, this first day of April, A. D. 1895.

A. C. BRADLEY, *Justice.* [SEAL.]

Settled by consent.

RODOLPHE CLAUGHTON,
Att'y for Plaintiff.
G. E. HAMILTON,
M. J. COLBERT,
Att'ys for Defendant.

Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia,* } ss:

I, John R. Young, clerk of the supreme court of the District of Columbia, do hereby certify the foregoing pages, numbered from 1 to 34, inclusive, to be true copies of originals in cause No. 34474, at law, wherein John W. Warner, administrator of the estate of Joseph W. Collins, deceased, is plaintiff and The Baltimore and Ohio Railroad Company, a corporation, is defendant, as the same remain upon the files and records of said court.

Seal Supreme Court of the District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 8th day of April, A. D. 1895.

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 452. John W. Warner, adm'r, &c., appellant, *vs.* The Balto. & Ohio R. R. Co. Court of Appeals, District of Columbia. Filed Apr. 9, 1895. Robert Willett, clerk.

21

TUESDAY, *May 14th, A. D.* 1895.

* * * * * * *

JOHN W. WARNER, Administrator of the Estate of Joseph W. Collis, Deceased, Appellant,
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY. } No. 452.

The argument in the above-entitled cause was commenced by Mr. Rodolphe Claughton, attorney for the appellant, and was continued by Mr. M. J. Colbert, attorney for the appellee, and was concluded by Mr. Rodolphe Claughton, attorney for the appellant.

22 JOHN W. WARNER, Administrator of the Estate of
of Joseph W. Collis, Deceased, Appellant,
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY. } No. 452.

Opinion of Court.

Mr. Justice MORRIS delivered the opinion of the court:

This is a suit to recover damages for the alleged unlawful killing of the appellant's intestate through the negligence of the agents and employees of the appellee. On the morning of June 22, 1893, Joseph W. Collis was struck and instantly killed on the track of the Baltimore and Ohio Railroad Company at a small station just north of the city of Washington known as University station, by the engine of an express train of that company coming from the northwest in the direction of Washington, while he was apparently engaged in an attempt to board another train of the same company, an accommodation train standing or slowly moving upon the adjacent track and which was bound in the opposite direction. It appears that on the day before he had purchased what is known as a round-trip ticket, good for thirty days, by the coupon of which, found upon his person after his death, he was entitled to be conveyed from University station to a neighboring station north of it known as Forest Glen. At University station there is a double track running for about a mile or upwards in a straight direction nearly due north and south, and with an uninterrupted view of the road for that distance towards the north. The western track is used for trains moving towards Washington from the north and west, the eastern track for trains going north and west from Washington. On the west side of the road is the ticket office, with a platform around it more or less covered. On the east side is a smaller uncovered platform. About 1,600 feet to the north of the station is a post where it is usual to sound the whistles of engines coming south on the western track, so as to give timely notice of their approach at University station.

About 9 o'clock of the morning of June 22, 1893, the accommodation train referred to had come out from Washington, and either had stopped or was about to stop at University station; for the testimony is conflicting as to whether it had actually come to a stop; and it does not appear whether, when it did come to a stop, any passenger disembarked, or that there was any other person than the deceased to board the train. It is presumed that Collis desired to take the train in order to be conveyed to Forest Glen. He had been seen standing for some time on the western platform; and as the train which he seemed desirous to take came into the station, he started to cross a plank walk which connected the two platforms, presumably so as to enter the train from the eastern platform, from which most easy and convenient access was had to it. His way, however, seems to have been blocked by the incoming train before he could effect a crossing; and thereupon he deviated obliquely

from the plank walk, going southward upon the western track and seemingly intending to gain access to the train from the western side, the purpose of the oblique movement apparently being to bring him into line with the platform or entrance landing of one of the cars of the train. An express train from the west was moving south at the time on the western track at the rate of about forty or fifty miles an hour. There is conflict of testimony as to whether the whistle of its engine had been sounded at the whistling post north of the station, which has been mentioned. Immediately, however, before Collis was struck, the engineer of the express train sounded the danger signal, consisting of two or three sharp, quick and shrill blasts from the whistle of the engine; but it is controverted whether this was done in time to be of any service. Collis was struck and killed while his foot was still on the easternmost rail of the western track.

The only eyewitness of the transaction was a passenger in the accommodation train, although there were other witnesses introduced on behalf of the plaintiff to show that no whistle had been sounded at the whistling post.

On behalf of the plaintiff evidence was also introduced of the existence of a rule of the railroad company to the effect that, whenever a train was standing at a station engaged in receiving or discharging passengers, no other train should attempt to pass the station until the former had commenced to move, or until its conductor had signalled that other trains might proceed. On behalf of the defendant it was testified that this rule had become obsolete and impracticable; and it was argued that, even if it was in force, it was not applicable to the circumstances of this case, and that it did not appear that the deceased had any knowledge of its existence or had acted upon the faith of it. There was testimony also on behalf of the defendant to controvert the inference of negligence from its alleged failure to sound the whistle in due time; but into the details of this testimony it is unnecessary here to enter.

Upon the case as thus made the defendant moved for an instruction to the jury to return a verdict for the railroad company; and the instruction was given, and a verdict was rendered, upon
23 which judgment was duly entered. To the ruling of the court exception was taken on behalf of the plaintiff; and the case is now here upon his appeal.

The meagreness of the testimony in behalf of the plaintiff in this case must be apparent to every one. It was probably unavoidable; for, as we have stated, there was only one eyewitness of the transaction, and he naturally could have no knowledge and could give no explanation of the circumstances that induced the deceased to place himself in the evidently perilous situation in which he met his death. The station where the accident occurred appears to have been but little frequented, except perhaps at certain hours of the day. It does not appear that there were any persons, other than the deceased, present at the station at the time of the accident; and it does not seem that there are any houses or population in the immediate neighborhood. It is the misfortune, therefore, of the plaintiff's

case that he has no witnesses sufficiently to substantiate it, and that the case itself is almost of necessity based upon inference and conjecture.

There is testimony, it is true, on behalf of the plaintiff sufficient to go to the jury, however weak it may be in fact, upon the question of the defendant's negligence. Whether the engineer of the express train took the ordinary and usual and most reasonable precaution of sounding the whistle of his engine at the place prescribed for him to do so; whether it was due care and caution on his part to run his train into and by this station at the rate of speed at which he did run it; whether the danger signal was given in due time; and whether the engineer should not have stopped his train before entering the station; and whether he could not have stopped it anyhow in time to prevent the disaster which supervened, are all questions upon which the verdict of a jury might perhaps properly have been solicited; although, as we have intimated, the verdict, if in favor of the plaintiff, would undoubtedly be based in a great measure upon conjecture, and conjecture is not a proper basis for judicial determination.

But we do not understand the ruling of the trial court in this case to be founded upon the insufficiency of the proof of the defendant's negligence, but upon the apparent contributory negligence of the deceased himself, and the total failure of the plaintiff's proof to excuse it or to account for it.

That the deceased placed himself in a position of obvious peril is manifest; and that his death was the result immediately of his own voluntary act is too clear for any controversy. If he was justified by the circumstances in so exposing himself to danger, and these circumstances were such as to relieve him from the imputation of contributory negligence, it is incumbent on the plaintiff to adduce proof to that effect. For contributory negligence is necessarily implied from a person's exposure of himself to a position of obvious peril, unless the circumstances, to be shown by him or on his behalf, are such as tend to disprove the inference, whereupon it becomes a question for a jury. Now, we fail to find in the present case any evidence whatever to rebut the presumption of negligence which the law infers from the conduct of the deceased.

It may be assumed that the deceased was entitled to the immunity and protection due from a common carrier to its passengers. But the extent of this immunity and of this protection will differ under different circumstances. It certainly cannot be claimed with reason that the immunity extends so far as to guarantee all the acts of a person who has in his possession a ticket entitling him to transportation. When the common carrier has provided all the appliances that can reasonably be required from it, no further liability on its part can accrue to the benefit of the passenger or proposed passenger until the latter manifests by some overt act that he proposes forthwith to exercise the right of transportation to which he has become entitled. In exercising this right the passenger must also exercise the ordinary care and caution which any reasonable man would exercise under similar circumstances. He is not enti-

tled with impunity to stand upon or cross the tracks of a railroad company, or to enter its trains at an unusual place or in an unusual way, or to leave them in any different place or way, or otherwise to disregard the usual safeguards which every person of reasonable mind and sufficient intelligence recognizes as right and proper to be observed when dealing with the modern instrumentalities of rapid transit, unless there has been some inducement, express or by implication, held out by the common carrier or its agents that one may depart therefrom without danger. A course of conduct pursued or tolerated may amount to such inducement. Usage or custom may constitute an inducement; and so may the special necessities of any situation. Various cases that have been cited in the argument of this case are based upon this theory, such as The Baltimore and Ohio Railroad Company *v.* Haner, 60 Md., 463; The Phil., Wilm. & Balt. R. R. Co. *v.* Anderson, 72 Md., 529; Terry *v.* Jewett, 78 N. Y., 343; Jewett *v.* Klein, 27 N. J. Eq., 550, and Atchison, Topeka & Santa Fe R. R. Co. *v.* Shean, 18 Col., 368. In all these cases it appeared that there was assurance of some kind, direct or indirect, express or implied, by the common carrier to the person injured that the latter might do with safety what he assumed to do. But in the absence of any such assurance, we fail to see, either from reason or from authority, why a common carrier should be held responsible for the departure of a passenger or intending passenger from the ordinary rules of prudence or common sense.

It has been repeatedly said that the very presence of a railroad track is itself notice of danger; and no man of ordinary intelligence has the right to go upon it without taking the ordinary precaution of stopping and looking for approaching trains. A passenger or intending passenger is equally with other persons bound by this rule, except where, by the action of the common carrier, he has been reasonably induced to believe that there is no occasion for its observance. Where he has been induced to alight from a car on the side opposite from the platform, although the presence of another track there and the possibility of the passage of other trains on that track, constitute an element of danger, he is entitled to immunity in consequence of the inducement. So, where he must cross
24 a track in order to take another train to continue his journey, he is entitled to presume that he may do so in safety. And numerous other instances may be cited from adjudged cases in which parties have been held entitled to recover for injuries sustained by them, when it appeared that they risked danger in consequence of representations held out to them that the situation was free from danger. But where there has been no inducement or representation of any kind, and a person has by his own voluntary act, as in the present case, assumed a position of obvious danger, although no doubt the deceased did not fully realize the extent of his danger and his sad mishap was in all probability the result of some sudden impulse that induced him to forget or ignore the danger for the time, yet his action was not any the less contributory negligence in law, and it should not be charged to the account of the defendant. There is total failure of proof on the part of the plaintiff to show

any inducement by the defendant to the deceased that would tend in any manner to justify or excuse the action of the latter. This, as we have intimated, may be his misfortune rather than his fault, but whatever may be the cause of it, the fact exists, and we cannot ignore it.

We regard our conclusion in this case as fully supported by one of the latest utterances of the Supreme Court of the United States upon the subject, the case of Elliott *v.* Chicago, Milwaukee and St. Paul R. R. Co., 150 U. S., 245, in which the substantial facts were not very unlike those of the present case. There the Supreme Court of the United States, by Mr. Justice Brewer, said:

"We are of opinion that the deceased was guilty of contributory negligence, such as to bar any recovery. It is true that questions of negligence and contributory negligence are ordinarily questions of fact to be passed upon by a jury; yet when the undisputed evidence is so conclusive that the court would be compelled to set aside a verdict returned in opposition to it, it may withdraw the case from the consideration of the jury, and direct a verdict. Railroad Co. *v.* Houston, 95 U. S., 697; Schofield *v.* Chicago, Milwaukee and St. Paul Railroad Co., 114 U. S., 615; Delaware, Lackawanna, &c., Railroad Co. *v.* Converse, 139 U. S., 469; Aerkfetz *v.* Humphreys, 145 U. S., 418.

"What then are the facts concerning the accident? It took place at a station called Meckling, a hamlet of two or three houses, and of so little importance that at the time the company had no station agent there. The main track of the defendant's road ran eastward and westward in a straight line, and the ground was level. * * *

"It thus appears that the deceased, an experienced railroad man, on a bright morning, and with nothing to obstruct his view, starts along and across a railroad track, with which he was entirely familiar, with cars approaching and only 25 or 30 feet away, and before he gets across that track is overtaken by those cars and killed. But one explanation of his conduct is possible, and that is that he went upon the track without looking to see whether any train was coming. Such omission has been again and again, both as to travellers on the highway and employees on the road, affirmed to be negligence. The track itself, as it seems necessary to iterate and reiterate, is itself a warning. It is a place of danger. It can never be assumed that cars are not approaching on a track, or that there is no danger therefrom. It may be as is urged, that his motive was to assist in getting the hand car out of the way of the section moving on the siding. But whatever his motive, the fact remains that he stepped on the track in front of an approaching train, without looking or taking any precautions for his own safety.

"This is not a case in which one, placed in a position of danger through the negligence of the company, confused by his surroundings, makes perhaps a mistake in choice as to the way of escape, and is caught in an accident. For here the deceased was in no danger. He was standing in a place of safety on the south of the main track. He went into a place of danger from a place of safety, and went in without taking the ordinary precautions imperatively required of

all who place themselves in a similar position of danger. The trial court was right in holding that he was guilty of contributory negligence."

The well-known rules of law here repeated by Mr. Justice Brewer would seem to apply with equal force to the case before us. In this case as in that, there is but one possible explanation of the conduct of the deceased; and that is either that he went upon the track without looking to see whether any train was coming, when, if he had taken that ordinary and necessary precaution, he could not fail to see the express train that was coming down upon the track, or else having looked and seen that train, he took the chances of being able to cross the track before it reached him. It is true that here the deceased intended to board the defendant's train as a passenger, and was neither an ordinary passenger on the highway nor an employé of the road; but we do not understand that a person intending to become a passenger on a train is thereby relieved, any more than other persons, from the observance of the ordinary rules of prudence. It is only when the passenger has placed himself actually or constructively in the charge of the common carrier that he becomes entitled to all the immunities of a passenger; and he may not even then disregard the ordinary safeguards, unless there has been inducement or representation to him that he may do so with safety. We presume that a person could not hold a railroad company to liability if he alighted from a car on the wrong side, on an adjacent track, instead of the platform on the other side, and was thereby injured, unless there was inducement to him from the company to do so; and a person intending to become a passenger can be in no better position than one who desires to leave a train. A common carrier is bound to very great care and caution towards its passengers; but these are not therefore entitled to disregard the ordinary precautions required of prudent men in their situation, so as to charge the common carrier with liability for the injuries sustained by them in consequence of such disregard. It is the absence of all proof here to show inducement on the part of the rail-
25 road company to the deceased to do what he did that compels us to hold him to the inference that must necessarily be drawn from his conduct in the absence of such inducement, or of testimony tending to show its existence.

The case of The Chicago, Milwaukee & St. Paul Railway Co. *v.* Lowell, 151 U. S., 209, which was decided by the Supreme Court of the United States within a short time after the Elliott case, above cited, was that of a passenger who was injured in alighting from a train, by getting off a car on the side next to an adjacent track and being struck by a train moving on that track while he was attempting to cross it. The trial court in that case had left the issue of contributory negligence on the part of the plaintiff, as well as of negligence on the part of the defendant, to the jury, which found for the plaintiff; and the Supreme Court of the United States, in an opinion by Mr. Justice Brown, sustained the ruling. But we do not understand this decision to be antagonistic to that in the Elliott case, or inconsistent therewith. The case of The Railway Company

v. Lowell plainly falls into the category of cases, to which reference has already been made, in which there was inducement or representation by the railroad company that the act, which resulted in injury, could be done with safety. In that case it was shown that there was a rule of the company posted up in the cars which directed passengers to alight on the side more distant from the adjoining track, and thus to avoid danger from trains passing on that track. But the court said:

"Assuming that the plaintiff was bound to read this rule, and was chargeable with knowledge of its contents, there was other testimony tending to show that it was habitually disregarded by passengers with the acquiescence of the conductor and the servants of the road about the station. There was evidence that the plaintiff and his companion Forsberg were met upon the platform of the car by the collector, who asked for their tickets, which were delivered to him; that the collector saw them get off on the south side (next to the adjacent track) and said nothing to them, but immediately upon receiving their tickets entered the smoking car; that no objection was raised to their getting off on the south side, and that other people were in the habit of getting off in the same way. Now, if the custom of passengers to disregard the rule was so common as to charge the servants of the road with notice of it, then it was either their duty to take active measures to enforce the rule, or to so manage their trains at this point as to render it safe to disregard it."

Plainly there was testimony in this case tending to show a usage, sanctioned or acquiesced in by the railroad company, which the plaintiff only followed. In other words, there was inducement to the plaintiff by the railroad company that he might do with safety that which he attempted to do. But that is not the present case.

Under the testimony adduced in the present case, we do not think that it was error in the trial court to direct a verdict for the defendant; and we must sustain that ruling.

The judgment of the court below must therefore be affirmed, with costs; and it is so ordered.

26 TUESDAY, *October 8th, A. D.* 1895.

* * * * * * *

JOHN W. WARNER, Administrator of the Estate of Joseph W. Collis, Deceased, Appellant,
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY.

No. 452. October Term, 1895.

Appeal from the supreme court of the District of Columbia.

This cause came on to be heard on the transcript of record from the supreme court of the District of Columbia and was argued by counsel; on consideration whereof it is now here ordered and adjudged by this court that the judgment of the said supreme court in this cause be, and the same is hereby, affirmed with costs.

Per MR. JUSTICE MORRIS.

October 8, 1895.

MONDAY, *October 14th, A. D.* 1895.

JOHN W. WARNER, Administrator of the Estate of Joseph W. Collis, Deceased, Appellant,
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY. } No. 452.

On motion of Mr. R. Claughton, attorney for the appellant in the above-entitled cause, it is ordered that a writ of error to remove said cause to the Supreme Court of the United States be, and the same is hereby, allowed on giving bond in the sum of three hundred dollars.

27 Know all men by these presents that we, John W. Warner, administrator of the estate of Joseph W. Collis, deceased, as principal, and the American Banking and Trust Company of Baltimore City, as surety, are held and firmly bound unto the Baltimore and Ohio Railroad Company in the full and just sum of three hundred dollars ($300), to be paid to the said Baltimore and Ohio Railroad Company, its certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this first day of November, in the year of our Lord one thousand eight hundred and ninety-five.

Whereas lately, at a Court of Appeals of the District of Columbia, in a suit depending in said court between John W. Warner, administrator of the estate of Joseph W. Collis, deceased, appellant, and The Baltimore and Ohio Railroad Company, appellee, a judgment was rendered against the said John W. Warner, administrator, and the said John W. Warner, administrator, having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Baltimore and Ohio Railroad Company, citing and admonishing it to be and appear at a Supreme Court of the United States, to be holden at Washington, within 30 days from the date thereof:

Now, the condition of the above obligation is such that if the said John W. Warner, administrator, shall prosecute said writ to effect and answer all costs if he fail to make his plea good, then the above obligation to be void: else to remain in full force and virtue.

JOHN W. WARNER, [SEAL.]
Administrator of the Estate of Joseph W. Collis, Dec'd.
THE AMERICAN BANKING AND TRUST COMPANY OF BALTIMORE CITY, [SEAL.]
By JAS. BOND, *Pres.* [SEAL.]

Sealed and delivered in the presence of—
Witness as to signature of John W. Warner, adm'r:
R. CLAUGHTON.

Attest:
[SEAL.] JNO. T. STONE, *Sec'y.*

Approved by—
R. H. ALVEY, *Ch. Justice.*

[Endorsed:] No. 452. John W. Warner, adm'r, *vs.* The Baltimore & Ohio Railroad Co. Bond for costs, writ of error to Supreme Court U. S. Court of Appeals, District of Columbia. Filed Nov. 4, 1895. Robert Willett, clerk.

28 UNITED STATES OF AMERICA, *ss:*

To the Baltimore and Ohio Railroad Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein John W. Warner, administrator of the estate of Joseph W. Collis, deceased, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Richard H. Alvey, Chief Justice of the Court of Appeals of the District of Columbia, this 4th day of November, in the year of our Lord one thousand eight hundred and ninety-five.

R. H. ALVEY,
Chief Justice of the Court of Appeals of the District of Columbia.

Service acknowledged.
G. E. HAMILTON,
Att'y for Appellee.

[Endorsed:] Court of Appeals, District of Columbia. Filed Nov. 5, 1895. Robert Willett, clerk.

29 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals, before you or some of you, between John W. Warner, administrator of the estate of Joseph W. Collis, deceased, appellant, and The Baltimore and Ohio Railroad Company, appellee, a manifest error hath happened, to the great damage of the said appellant, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record

and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 4th day of November, in the year of our Lord one thousand eight hundred and ninety-five.

Seal Court of Appeals, District of Columbia.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

30 Court of Appeals of the District of Columbia.

I, Robert Willett, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 29, inclusive, contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of John W. Warner, administrator of the estate — Joseph W. Collis, deceased, appellant, *vs.* The Baltimore and Ohio Railroad Company, No. 452, October term, 1895, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 8th day of November, A. D. 1895.

Seal Court of Appeals, District of Columbia.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: Case No. 16,092. District of Columbia Court of Appeals. Term No., 377. John W. Warner, administrator of the estate of Joseph W. Collis, deceased, plaintiff in error, *vs.* The Baltimore & Ohio Railroad Company. Filed November 21st, 1895.